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JOSEPH F. SPANIOL, JR.

CASE NO: 88-650

In the Supreme Court of the United States

OCTOBER TERM, 1988

SANDRA S. GROGAN, as Personal Representative of the Estate of BENJAMIN GROGAN, Deceased, PATRICIA A. DOVE, as Personal Representative of the Estate of JERRY DOVE, Deceased, JOHN F. HANLON, JR., GORDON G. McNEILL, EDMUNDO MIRELES, JR., RICHARD A. MANAUZZI, GILBERT M. ORRANTIA, and RONALD G. RISNER,

Petitioners,

vs.

BRENDA F. PLATT, as Personal Representative of the Estate of MICHAEL LEE PLATT, Deceased, and JANE DOE, as Personal Representative of the Estate of WILLIAM RUSSELL MATIX, Deceased,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals, Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether Congress intended the phrase "injured in his business or property" to include pecuniary losses consequential to personal injuries within the ambit of Civil RICO.

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CITATION TO OPINION BELOW

The opinion below appears as *Grogan v. Platt* 835, F.2d 845 (11th Cir. 1988).

STATEMENT OF THE CASE

Respondent accepts the Petitioners' Statement of the Case and of the Facts, with the qualification that the matters set forth in Petitioners' Statement of the Facts are not established facts but are only allegations set forth in Petitioners' Complaint. Because the matter was before the District Court on Respondents' Motion to Dismiss, Respondent recognizes that the allegations in the Complaint must be taken as true for purposes of this Petition.

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This Court should deny the Petition for Writ of Certiorari because the decision of the Eleventh Circuit is in complete accord with Congress' intent in enacting the Civil RICO provisions, with decisions of this Court, and with decisions of other Federal Courts of Appeal.

The RICO Statute provides a civil remedy only to a person ". . .injured in this business or property. . ." 18 U.S.C. §1964(c). RICO's civil damage provision is patterned after the civil damage provisions of the antitrust laws, and the "business or property" language is identical to the language found in the Clayton Act, 15 U.S.C §15. The Supreme Court in *Reiter v. Sonotone Corp.*, 442 U.S. 340, 99 S.Ct. 2326, 60 L.Ed.2d. 931 (1979) interpreting the antitrust counterpart, concluded that Congress must have intended to exclude some class of injuries by the phrase "business or property," stating:

> The phrase "business or property" also retains restrictive significance. It would, for example, exclude personal injuries suffered. 442 U.S. at 339, 99 S.Ct. at 2331.

Although the "business or property" language was not at issue in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d. 346 (1985), Justice Marshall, dissenting, discussed the "business or property" language and found that the exclusion for damages flowing from personal injury is equally applicable under the RICO statute. He stated:

> In addition, the statute permits recovery only for injury to business or property. It therefore excludes recovery for personal injuries. *Id.* at 3297.

The Plaintiffs' contention is identical to the contention asserted, and rejected, in *Drake v. B. F. Goodrich Co.*, 782 F.2d. 638 (6th Cir. 1986). In *Drake*, as in the instant case, injured plaintiffs and personal representatives of deceased plaintiffs attempted to state a claim under civil RICO for pecuniary injury resulting from personal injury and wrongful death allegedly caused by a violation of RICO's substantive provisions. The plaintiffs contended that a cause of action should be granted to anyone suffering pecuniary injury as a direct result of a violation of RICO's substantive provisions. In denying this contention, the Court stated:

> We find that RICO is inapplicable to the instant case because the injuries complained of are not within the ambit of the statute. *Id.* at 644.

See also *Campbell v. A. H. Robbins Co.*, 615 F.Supp. 496, 501 (D.C.Wis. 1985), and *Cuzzupe v. Paparone Realty Co.*, 596 F.Supp. 988, 991 (D.N.J. 1984).

Petitioners do not cite a single decision from any court wherein a civil RICO claim was permitted as a result of damages, pecuniary or otherwise, consequential to personal injury or wrongful death caused by a RICO predicate act. None of the decisions cited by Petitioners interpreting either the antitrust statutes or RICO statutes involve damages incurred as a result of personal injuries.

The gist of the Petitioners' argument is the misconception that Congress must have intended to include personal injuries within the ambit of civil RICO because Congress included murder and attempted murder as predicate acts. But as the Eleventh Circuit pointed out below, there are numerous situations where injuries resulting from murder or attempted murder would be compensable under civil RICO without being part of a personal injury claim. One need not look beyond the legislative history for an example of a compensable civil RICO stemming from the predicate act of murder. Speaking before the Senate on October 12, 1970 prior to final passage of the RICO legislation, Senator Dole gave the following example of the type of the damages Congress intended to guard against by including murder as a predicate act:

> The techniques and methods used in the infiltration of legitimate business enterprises are many and varied. A few case histories will demonstrate how easily a business can fall captive.
>
> The New York Times edition of June 29, 1969, reported how a New Jersey organized crime leader, Gene Catena, gained a foothold in a detergent manufacturer's business, North America Chemical Corp., of Patterson, N.J., by serving as a sales consultant. According to testimony released by the New York Harbor and Waterfront Commission, the owner of the detergent manufacturing company hired Catena's sales agency, called Best Sales, in

> 1964 under a 10-year contract which was not subject to cancellation. Catena and Best Sales thereafter, through the medium of arson and murder, attempted to force the A.&P. Tea Co., to buy a detergent that the company had previously tested and rejected. 116 Cong.Rec. 36296 (1970).

One need not "strain the sensibilities" to recognize that the target of Congress was the use of murder as a coercive medium. Congress in no way intended to federalize ordinary state remedies relating to personal injury and Plaintiffs cite nothing in the legislative history to indicate otherwise. The affirmance of the District Court's dismissal of the Complaint is entirely consistant with the legislative history of the RICO statute, the plain wording chosen by Congress, and the caselaw interpreting the civil damage provision.

CONCLUSION

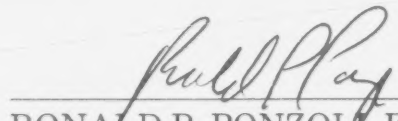
Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RONALD P. PONZOLI, ESQUIRE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that true and correct copies of the foregoing have been mailed, postage prepaid, this 10th day of November, 1988, to Bruce A. Zimet, Esquire, One Financial Plaza, Suite 2612, Fort Lauderdale, Florida 33394 and Carolina A. Echarte, Esquire, Buchbinder, 4th Floor, 46 Southwest First Street, Miami, Florida 33130.



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